



Decision and Reasons for Decision

Application Number: 2005/F0712

Applicant: Mr Peter Anderson

Respondent: Office of the Public Service Commissioner

Decision Date: 7 December 2006

Catchwords: section 43(1) - legal professional privilege - implied waiver
– whether waiver is a relevant issue - summary of legal
advice and statement that the summary is based on legal
advice constitutes waiver

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Reasons for Decision

Background

1. By letter dated 15 July 2005, the applicant applied to the Office of Public Service, Merit and Equity (**OPSME**) for access under the *Freedom of Information Act 1992* (Qld) (**FOI Act**) for copies of documents including:

“If privilege has been waived impliedly or expressly by release elsewhere (such as the Queensland Department of Education and the Arts), legal advice received by Mr George O’Farrell”.

2. On 2 September 2005, Ms Sara Pope, Manager Executive Services, Office of the Public Service Commissioner (**OPSC**):

- advised the applicant that 11 folios falling within the scope of his freedom of information (**FOI**) access application had been located; and
- made the initial decision to:
 - release seven of the folios to the applicant; and
 - refuse the applicant access to the remaining four folios on the basis that those folios were exempt from disclosure pursuant to section 43(1) of the FOI Act.

3. Ms Pope stated that the four folios claimed to be exempt from disclosure pursuant to section 43(1) of the FOI Act constituted a “[l]etter from Crown Law to the Public Service Commissioner dated 5 May 2005” (**the matter in issue**).

4. By letter dated 23 September 2005, the applicant requested an internal review of OPSC’s initial decision. The applicant requested an internal review in relation to a sufficiency of search issue, as well as:

“an internal review of your decision to exempt from release the letter from Crown Law to the Public Service Commissioner dated 5 May 2005...”.

5. On 24 October 2005, Mr George O’Farrell, Public Service Commissioner (**PSC**), OPSC made the internal review decision. In relation to the matter in issue, Commissioner O’Farrell affirmed the initial decision dated 2 September 2005, finding that it was exempt from disclosure pursuant to section 43(1) of the FOI Act.

Steps taken in the external review process

6. By letter dated 3 November 2005, the applicant applied to this Office for external review of the PSC’s internal review decision. The applicant made his application for external review in relation to a sufficiency of search issue, as well as regarding the applicability of section 43(1) of the FOI Act to the matter in issue.
7. As the sufficiency of search issue was resolved to the applicant’s satisfaction during the conduct of the external review, it is not necessary to address that issue in this decision.

8. Accordingly, this decision focuses on the balance of the applicant's application for external review and determines whether:
- legal professional privilege (**LPP**) over the matter in issue has, or has not, been waived; and therefore
 - the matter in issue is, or is not exempt from disclosure on the basis of section 43(1) of the FOI Act.
9. A chronology of relevant events up to and including the applicant's application for external review is as follows:
- 26 April 2005 - the PSC requested legal advice from Crown Law regarding a matter involving the applicant;
 - 5 May 2005 - Crown Law provided legal advice in a letter (the matter in issue) to the PSC;
 - 20 May 2005 – the PSC advised the applicant of his decision regarding an employment matter involving the applicant;
 - 21 May 2005 – the applicant informed the PSC that he disputed the decision and would apply to Education Queensland;
 - 22 May 2005 – the applicant applied to the Director-General of Education Queensland (**DG-EQ**);
 - 23 May 2005 – the PSC wrote to the DG-EQ informing him of his decision in the employment matter involving the applicant;
 - 29 June 2005 – a pro forma letter including a summary of the legal advice dated 5 May 2005, and a statement that the summary was based on legal advice, was circulated to twenty-nine Directors-General (or equivalent) of government departments / agencies;
 - 5 July 2005 – the same pro forma letter dated 29 June 2006 was circulated, with an accompanying email, to twenty-six Human Resource Managers (or equivalent) of government departments / agencies;
 - 15 July 2005 – the applicant submitted an FOI access application to the OPSME;
 - 18 July 2005 – the DG-EQ wrote to the applicant informing him of his decision regarding the employment matter involving the applicant;
 - 2 September 2005 – Ms Pope, Manager Executive Services, OPSC provided the applicant with the initial decision regarding the applicant's FOI access application;
 - 26 September 2005 – the applicant applied for internal review of the initial decision;
 - 24 October 2005 – Mr O'Farrell, PSC, OPSC issued the internal review decision; and
 - 3 November 2005 – the applicant applied to this Office for external review of the internal review decision.
10. A chronology of relevant events occurring subsequent to the applicant's application for external review is as follows:
- 1 December 2005 – this Office wrote to the OPSC, requesting further information from it;
 - 20 December 2005 – the OPSC advised this Office that it did not send a copy of the matter in issue to the DG-EQ;

- 19 January 2006 – the OPSC provided this Office with copies of its request to Crown Law for legal advice dated 26 April 2005 and the PSC’s letter to the DG-EQ dated 23 May 2005;
- 9 February 2006 –this Office wrote to the applicant expressing its preliminary view;
- 28 February 2006 –the applicant made submissions to this Office regarding the preliminary view dated 9 February 2006, and attached to his submissions a copy of the email dated 5 July 2005 by which the pro forma letter dated 29 June 2006 was circulated to twenty-six Human Resource Managers (or equivalent) of government departments / agencies;
- 9 March 2006 - this Office wrote to the applicant expressing its further preliminary view;
- 24 March 2006 – the applicant made submissions to this Office regarding the preliminary view dated 9 March 2006;
- 21 April 2006 –this Office wrote to the OPSC, requesting that the OPSC respond to the applicant’s submissions in his letter dated 24 March 2006;
- 4 May 2006 –the OPSC made submissions to this Office, and provided copies of the pro forma letter dated 29 June 2005 that was circulated to 29 Directors-General (or equivalent) on that date, and to 26 Human Resource Managers (or equivalent), with an accompanying email, on 5 July 2005;
- 18 August 2006 –this Office wrote to the OPSC expressing the preliminary view that the matter in issue was not exempt from disclosure under section 43(1) of the FOI Act (on the basis that the letter from the DG-EQ to the applicant dated 18 July 2005 constituted waiver of LPP);
- 15 September 2006 – Crown Law made submissions to this Office on behalf of its client the OPSC (on the basis that section 43(1) of the FOI Act does not enable inquiry to be made regarding waiver of LPP and that no implied waiver of LPP had occurred);
- 6 October 2006 – this Office wrote to Crown Law expressing the preliminary view that the matter in issue was not exempt from disclosure under section 43(1) of the FOI Act (on the basis that section 43(1) of the FOI Act does enable inquiry to be made regarding waiver of LPP, and that either the PSC’s or OPSC’s wide distribution of the pro forma letter on 29 June 2005 and 5 July 2005, or the DG-EQ’s letter to the applicant dated 18 July 2005, constituted waiver of LPP); and
- 26 October 2006 – Crown Law wrote to this Office advising that its client did not wish to make any further submissions in this external review.

11. In coming to a decision in this matter, I have carefully considered all submissions made by the parties and their representatives and the relevant case law.

Matter in issue

12. The matter in issue consists of a four page letter containing legal advice dated 5 May 2005, from a Deputy Crown Solicitor of Crown Law to the PSC of OPSME.

Findings

Section 43(1)

13. Section 43(1) of the FOI Act provides:

43(1) *Matter is exempt if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.*

14. The section 43(1) exemption turns on the application of those principles of Australian common law which determine whether a document, or matter in a document, is subject to legal professional privilege.

Legal Professional Privilege

15. In the High Court decision of *Baker v Campbell* (1983) 153 CLR 52 at 144, Deane J stated:

“... a person should be entitled to seek and obtain legal advice in the conduct of his affairs and legal assistance in and for the purposes of the conduct of actual or anticipated litigation without the apprehension of being thereby prejudiced.”

16. More recently, in *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49 (**Esso**), Gleeson CJ, Gaudron and Gummow JJ of the High Court said at 64:

“The privilege exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers.”

17. In *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 583, Kirby J of the High Court stated:

“Once the doctrine applies and is not excluded by the various derogations and exceptions recognised by the common law, it attaches to the communications concerned. No further balancing of public interests, for example between that of protecting the privilege and that of securing the truth, is either necessary or possible. Legal professional privilege is itself the product of a balancing exercise between competing public interests.”

18. In the *Esso* decision, the High Court specified that legal professional privilege can apply to the following two categories of communication:

- (1) confidential communication between a client and the client’s lawyers, when the communication is made for the dominant purpose of obtaining or providing legal advice or assistance; and
- (2) confidential communication between a client or a third party and the client’s lawyers, when the communication is made for the dominant purpose of using, or obtaining material for use, in litigation that had commenced or was reasonably anticipated at the time of the communication.

19. Since the judgement of the Full Federal Court in *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217, legal professional privilege can also apply to a third category of communication:

- (3) confidential communication between a third party and a client or the client’s lawyers, when the communication is made for the dominant purpose of obtaining legal advice.

20. The matter in issue is communication of a type that falls within the first mentioned category (1), that is, a confidential communication between a client and the client's lawyers, when the communication is made for the dominant purpose of obtaining or providing legal advice or assistance.
21. In this review, the applicant accepts that:
- the dominant purpose of the matter in issue was to provide legal advice or assistance;
 - Crown Law solicitors are lawyers able to satisfy the lawyer component of the lawyer/client relationship necessary in order for LPP to attach to communications; and
 - the matter in issue initially possessed the necessary degree of confidentiality in order for LPP to attach to the communication.
22. There are qualifications and exceptions which may affect the question of whether a communication attracts LPP, or remains subject to LPP, despite the communication *prima facie* falling within one of the above three categories. Whether or not the LPP which initially attached to the matter in issue has been waived is the issue for determination in this decision.

Waiver of LPP

23. LPP is waived when a client entitled to LPP acts in a manner inconsistent with preservation of the confidentiality that LPP aims to protect. There are two ways in which LPP may be waived:
- by express or intentional waiver; or
 - by waiver imputed by operation of law (referred to in some cases as implied waiver).
24. In the circumstances of this external review, the OPSC has neither expressly nor intentionally waived LPP. Therefore, it is necessary to consider whether LPP has been otherwise waived.

Can the Information Commissioner determine issues of waiver?

25. In its submissions dated 6 October 2006, the OPSC submitted that:
- the “*terms of s.43(1) of the FOI Act do not invite or require an inquiry to be made about waiver of privilege...*”; and
 - an inquiry regarding waiver of privilege is not able to be carried out by the Information Commissioner as the inquiry “*is heavily context-dependent, and there is no relevant context in the present case in which the inquiry can be carried out*” (per the decision of McKechnie J of the Supreme Court of Western Australia in *Department of Housing and Works v Bowden* [2005] WASC 123 (**Bowden**)).

26. The OPSC referred to paragraphs 17-19, 22, 25, 46 and 47 of *Bowden*, wherein McKechnie J states:
- “16 *In general, it is only necessary for a decision-maker, including the Commissioner, to decide whether, on its face, or after information has been received, if necessary, a document is prima facie privileged from production in legal proceedings.*
- 17 *Whether privilege has been waived may involved subtle questions of law... It may, but need not, necessarily, involve consideration of subjective intention of an agency and whether a particular officer stands in the shoes of the agency in disclosing material intentionally. It may involve questions of inconsistency of conduct.*
- 18 *Parliament could not have intended that these questions should be resolved at every level of an FOI request by person untrained in the law and in a vacuum without the matrix of extant legal proceedings to resolve the question of waiver.*
- 19 *A finding that a document is prima facie the subject of legal professional privilege is a finding that the matter would be privileged from production in legal proceedings on that ground. It may be that in specific legal proceedings, following enquiry, a court might hold that the privilege has been waived. Such a finding of waiver does not derogate from the proposition that legal professional privilege once attached to a document and attached at the time of the FOI request.*
- ...
- 22 *...the difficulty in the approach of Williams J [in Qld Law Society v Albietz] and ...the [West Australian Information] Commissioner ... is that conclusions were reached by hypothesising about legal proceedings ... Without knowing the effect on a litigant as a party to a proceeding, it is impossible to measure the effects of fairness, or more correctly unfairness, on a failure to disclose some part of legal professional advice. In my opinion, it is for this reason that the High Court in Mann v Carnell were at pains to confine the impact of fairness to legal proceedings. It is only in legal proceedings that a judgment can be made, inter alia, about considerations of fairness...*
- ...
- 25 *In my opinion, Parliament did not intend that decision-makers under the FOI should be required to go through the factual permutations that may operate to resolve questions of waiver of privilege, especially when the exercise is hypothetical because there are no legal proceedings. If it appears, prima facie, that a matter would be privileged from production in legal proceedings on the ground of legal professional privilege then it is exempt matter.*
- ...
- 46 *...I hold that once a document is determined, prima facie, to be the subject of legal professional privilege questions of waiver do not arise under the FOI Act.*
- 47 *I conclude that the question of waiver is one that is only able to be answered in legal proceedings when the fairness of maintaining the privilege to the detriment of a litigant is able to be judged and balanced in the absence of legal proceedings, there is nothing to balance and fairness does not operate at large.” [my emphasis]*
27. Further to the comments of McKechnie J at paragraph 22 of *Bowden* regarding the High Court’s decision in *Mann v Carnell* (1999) 201 CLR 1 (**Mann**) to replace the fairness test for imputed waiver of LPP with a test of inconsistency, I note that the following comments of Young J at paragraphs 132 and 133 of *AWB No. 5 Ltd v Cole* (No. 5) [2006] FCA 1234 (**AWB No. 5**) indicate his understanding that the

inconsistency test is more easily applied than the fairness test in circumstances where legal proceedings have not commenced:

“Fairness presupposes a balancing of interests between parties who are in dispute... There is also the difficulty that, outside the frame work of an inter partes dispute, fairness is truly a term of ‘indeterminate reference’...”

Mann anticipated that there will be cases in which considerations of fairness have little or no role to play... The broad question posed by Mann is whether, and to what extent, AWB’s disclosures are inconsistent with the maintenance of confidentiality in the documents which are at issue in these proceedings”.

28. A general line of authority allowing consideration of waiver of LPP in the context of FOI access applications has been followed in cases dealing with section 43(1) of the FOI Act and its Commonwealth counterpart, including decisions by:
- Williams J of the Supreme Court of Queensland in *Queensland Law Society Inc v Albietz* [2001] 1 Qd R 621; and
 - Tamberlin and Gyles JJ of the Full Federal Court in *Bennett v Chief Executive Officer, Australian Customs Service* (2004) 210 ALR 220.
29. Since *Bowden*, the following cases dealing with the Commonwealth counterpart of section 43(1) of the FOI Act have been decided, and accord with the general line of authority regarding waiver of LPP (in other words, they have allowed consideration of waiver of LPP in the context of FOI access applications):
- Deputy President Block of the Commonwealth Administrative Appeals Tribunal at [89] to [103] of *The Mining Holding Company and Commissioner of Taxation* [2006] AATA 491;
 - Member Webb of the Commonwealth Administrative Appeals Tribunal at [37] to [40] of *Albanese v Chief Executive Officer of the Australian Customs Service* [2006] AATA 783;
 - Greenwood J of the Federal Court at [51] of *Comcare v Foster* (2006) ALR 749; and
 - Sundberg J of the Federal Court at [15] and [54] to [57] of *Rio Tinto Ltd v Commissioner of Taxation* (2005) 224 ALR 299.
30. Also since *Bowden*, in the Western Australian Court of Appeal, *obiter dicta* of Buss JA (Steytler P and Pullin JA concurring) at [132] to [137] in *Lackovic v Insurance Commission of Western Australia* [2006] WASCA 38 involves inquiry regarding waiver of legal professional privilege regarding a document exempt from disclosure under clause 7 of Schedule 1 of the *Freedom of Information Act 1992 (WA)* (**FOI Act (WA)**), rather than adoption of the reasoning of McKechnie J (also of the Supreme Court of Western Australia).
31. In summary, I note that:
- in finding that clause 7 of Schedule 1 of the FOI Act (WA) does not invite or require inquiry regarding waiver of LPP, but simply determination of whether matter is *prima facie* privileged from production in legal proceedings, *Bowden* deviates from the general line of authority regarding waiver of LPP; and

- McKechnie J's reasoning in *Bowden* has not been adopted in subsequent cases in the Commonwealth Administrative Appeals Tribunal, Federal Court or Western Australian Court of Appeal.
32. In terms of statutory interpretation, I note that both section 43(1) of the FOI Act and clause 43 of the *Explanatory Notes to the Freedom of Information Bill 1991* (Qld) state that matter is exempt matter "... *if it would be privileged from production in a legal proceeding on the ground of legal professional privilege*" [my emphasis].
33. On interpretation of section 43(1) of the FOI Act and clause 43 of the *Explanatory Notes*, it is my view, contrary to *Bowden*, that:
- the terms of section 43(1) of the FOI Act expressly invite "hypothesising about legal proceedings"; and
 - the Queensland Parliament did intend for FOI practitioners to deal with the FOI Act in its entirety, even where this requires consideration and conclusion in relation to difficult questions of law including, but not limited to, section 43 of the FOI Act.
34. Further, upon consideration of the FOI Act as a whole, I consider that it is misconceived to assume that FOI decisions are made "in a vacuum" particularly given the Information Commissioner's:
- power to make inquiries and obtain information; and
 - obligation to adopt fair procedures and ensure that each participant has an opportunity to present their views in the course of each external review.
35. In summary, it is my view that:
- the approach followed in the general line of authority allowing consideration of waiver of LPP in FOI access applications should be applied in this external review, rather than the approach of McKechnie J in *Bowden*; and
 - statutory interpretation of the FOI Act as a whole, and section 43(1) in particular, supports adoption of this approach.
36. Accordingly, it is my view that the terms of s.43(1) of the FOI Act do invite and require my determination of whether or not the LPP that initially attached to the matter in issue has been waived.

Decisions from other jurisdictions examining waiver of LPP

37. The leading High Court authority on waiver is *Mann*. At paragraph 29 of *Mann*, Gleeson CJ, Gaudron, Gummow and Callinan JJ said:

"Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is 'imputed by operation of law'... This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. ... What brings about the waiver is the inconsistency, which the courts, where necessary informed by

considerations of fairness, perceive, between the conduct of the client and the maintenance of the confidentiality; not some overriding principle of fairness operating at large.”

38. Several cases from other jurisdictions have determined that disclosure of a summary of legal advice, and a statement that the summary is based on legal advice, constitutes implied waiver of LPP.
39. In determining that disclosure of a summary of legal advice, and a statement that the summary is based on legal advice, constitutes implied waiver of LPP, cases decided prior to *Mann* applied a test for imputed waiver of LPP expressed in terms of fairness (as set out in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475). Refer *Somerville v Australian Securities Commission* (1995) 13 ACLC 467; *Ampolex v Perpetual Trustee Company (Canberra) Limited (Ampolex No. 2)* (1996) 40 NSWLR 12; *Ampolex Limited v Perpetual Trustee Company (Canberra) Limited (Ampolex No. 3)* (1996) 137 ALR 28; *Federal Commissioner of Taxation v Coombes* (1999) 164 ALR 131; *Australian Unity Health Limited v Private Health Insurance Administration Council* [1999] FCA 1770.
40. Cases decided since *Mann* have applied the inconsistency test set out in *Mann* when considering whether disclosure of a summary of legal advice, and a statement that the summary is based on legal advice, constitutes implied waiver of LPP. At paragraphs 130, 133 and 134 of *AWB No. 5*, Young J made the following comments regarding application of the inconsistency test to determine whether LPP has been waived:

“... Under the test propounded in Mann, it is inconsistency between the conduct of the client and the maintenance of the confidentiality that the privilege is intended to protect which effects waiver of the privilege. Fairness has become a subsidiary consideration; it may be relevant to the court’s assessment of inconsistency in some contexts but not in others.

...

... The broad question posed by Mann is whether, and to what extent, AWB’s disclosures are inconsistent with the maintenance of confidentiality in the documents which are at issue...

In any application of Mann, the starting point must be an analysis of the disclosures or other acts or omissions of the party claiming privilege that are said to be inconsistent with the maintenance of confidentiality in the privileged material”.

41. In *Ashfield Municipal Council v Roads and Traffic Authority* [2004] NSWSC 917, in two letters from the Council to the RTA, the Council stated “Based on legal advice, it is Council’s view that Connell Wagner cannot enter and carry out work at the locations referred to ... because it needs the consent of Council... For your information, Council has obtained a detailed opinion from Mr T F Robertson QC. His opinion concludes as follows: [quote from opinion]. In making reference to the above quote Council is not waving [sic] the legal professional privilege attached to Robertson’s advice.” Barrett J held that the Council had waived LPP. At paragraph 22, he stated:

“It became inconsistent for the Council to continue to rely on the confidentiality of the opinion while at the same time using a statement of its substance and of the conclusion it expressed as a positive means of reinforcing to the RTA a position it asserted in the ongoing dialogue ... The inconsistency became the source of an implied consent... an intentional act inconsistent with the maintenance of

confidentiality does not lose its significance or assume some different character just because there was a subjective intention not to compromise the privilege.”

42. In *Bennett v Chief Executive Officer, Australian Customs Service* (2004) 210 ALR 220 (**Bennett**), the applicable law was the common law in the context of the Commonwealth equivalent of s.43(1) of the FOI Act (that is, s.42(1) of the Freedom of Information Act 1982 (Cth)). The Full Federal Court (Tamberlin and Gyles JJ, Emmett J dissenting) found that LPP had been waived by the following sentences in a letter from the Australian Government Solicitor to Mr Bennett’s solicitors:

- “AGS [Australian Government Solicitor] has now advised Customs that Public Service Regulation 7(13) does not prohibit all public comment by an officer on matters of public administration. Rather, the sub-regulation must be construed or “read down” so as not to apply to public comment on matters of administration which are not already on the public record ...
- AGS has advised Customs that your client is not correct in asserting that he is not subject to the Act and Regulations if he makes public statements about Customs-related matters in his capacity as President of COA [Customs Officers’ Association].”

At paragraph 6, Tamberlin J said:

“The above extracts express the substance of the advice that was given by the Australian Government Solicitor in each of the paragraphs. In my view, it would be inconsistent and unfair, having disclosed and used the substance of the advice in this way, to now seek to maintain privilege in respect of the relevant parts of that advice which pertain to the expressed conclusion. It may perhaps have been different if it had simply asserted that the client has taken legal advice and that the position which was adopted having considered the advice, is that certain action will be taken or not taken. In those circumstances, the substance of the advice is not disclosed but merely the fact that there was some advice and that it was considered. However, once the conclusion in the advice is stated, together with the effect of it, then in my view, there is imputed waiver of the privilege. The whole point of an advice is the final conclusion.”

At paragraph 65, Gyles J said:

“... The voluntary disclosure of the gist or conclusion of the legal advice amounts to waiver in respect of the whole of the advice to which reference is made including the reasons for the conclusion.”

Further, at paragraph 68, Gyles J said:

“It is well established that for a client to deploy the substance or effect of legal advice for forensic or commercial purposes is inconsistent with the maintenance of the confidentiality that attracts legal professional privilege.”

43. At paragraph 49 of the Federal Court decision of *Rio Tinto Ltd v Commissioner of Taxation* [2005] FCA 1336, Sundberg J held:

“The conduct of the respondent in twice providing to the applicant an Audit Report that disclosed the “gist” or “substance” of the privileged Audit Report documents is inconsistent with the maintenance of legal professional privilege over those documents and thus effects a waiver of the privilege”

44. In *Switchcorp Pty Ltd v Multimedia Ltd* [2005] VSC 425, Whelan J of the Supreme Court of Victoria found that an announcement made by Multimedia Ltd to the Australian Stock Exchange that “[t]he Board’s lawyers have been instructed to

vigorously defend the claim and have advised that the plaintiff's claim will not succeed" constituted waiver of LPP.

45. In the Federal Court case of *Seven Network Ltd v News Ltd* [2006] FCA 348, the sixteenth and twenty-second respondents (collectively referred to as Optus) discovered a document described as "the Alchemy Paper" to all parties in those proceedings. The Alchemy Paper included the statement "[o]ur legal advice is that the risk of damages being awarded against Optus is low". At paragraph 12, Sackville J of the found that:

"waiver has come about because Optus has voluntarily disclosed the gist or conclusion of the legal advice recorded in the document identified in the Alchemy Paper".

46. At paragraphs 135 to 139 of *AWB Ltd v Cole* [2006] FCA 571, Young J of the Federal Court discussed the principle that disclosure of a summary of legal advice, and a statement that the summary is based on legal advice, constitutes implied waiver of LPP. Further, at paragraph 158 of *AWB No. 5*, Young J noted that:

"[t]he authorities draw a distinction between a mere reference to the existence of legal advice, which will not usually amount to waiver, and cases in which the gist or substance of the legal advice has been disclosed".

47. In *AWB No. 5*, the Commonwealth argued that AWB Ltd had waived LPP when it disclosed the gist or substance, and in some cases the entirety, of legal advices (see paragraph 127). AWB Ltd submitted that the decision of *Bennett* was unsound in finding that the disclosure of a conclusion stated in legal advice amounted to waiver of LPP regarding the whole advice. At paragraph 163, Young J rejected AWB Ltd's argument and held that:

"it is well established that a voluntary disclosure of the gist, substance or conclusion of legal advice will amount to a waiver in respect of the whole of the relevant advice".

Information Commissioner decisions examining waiver of LPP

48. The following decisions of the Information Commissioner have also determined that disclosure of a summary of legal advice, and a statement that the summary is based on legal advice, constitutes implied waiver of LPP:

- *Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (1996) 3 QAR 206;
- *Queensland Law Society Inc and the Legal Ombudsman and Sir Lenox Hewitt* (1998) 4 QAR 328, affirmed by Williams J of the Queensland Supreme Court in *Queensland Law Society Inc v Albietz & Anor* [2000] 1 Qd R 621; and
- *Noosa Shire Council and Department of Communication and Information, Local Government and Planning; T M Burke Estates Limited (Third Party)* (2000) 5 QAR 428.

Was LPP waived?

49. In this external review, I have considered:

- (a) the third, fourth and fifth paragraphs of the pro forma letter dated 29 June 2005 that was forwarded by the PSC to twenty-nine Directors-General (or equivalent) of government departments / agencies on 29 June 2005, and to twenty-six Human Resources Managers (or equivalent) of government departments / agencies on 5 July 2005 (**the pro forma letter**), wherein the PSC states:

“The previous salary increase for SOs and above was published in the Government Gazette on 9 July 2004 with an effective date of 1 July 2004. This resulted in at least one claim for a variation of the termination payment made to an officer after 1 July 2004 but before 9 July 2004. Following very careful considerations of the law and policy relating to this issue, the claim was refused. This has resulted in a clarification of the policy surrounding such payments.

Employees who separate from your agency either through resignation, retirement or being offered a voluntary early retirement (VER) package are only entitled to be paid all separation payments at the salary level current at the date of separation. So, under no circumstances is an employee entitled to retrospective adjustment (back pay) when their date of separation is prior to the date on which the decision to vary salaries is made (i.e. the date of gazettal), even if the decision provides for a date of effect prior to their departure date.

This view is supported by legal advice and the Department of Industrial Relations.”

- (b) the second paragraph of the letter from the DG-EQ to the applicant dated 18 July 2005 (**the 18 July letter**), wherein the DG-EQ informs the applicant:

*“The Office of Public Service Merit and Equity (OPSME) has advised that there is no capacity to authorise back payment of wage increases to any employee who ceases their employment **prior** to the gazettal of any wage increases approved by the Public Service Commissioner. This position is based on legal advice obtained by Crown Law in relation to an entitlement to a benefit of salary increase after voluntary early retirement”*,

50. In its submissions dated 6 October 2006, in relation to the 18 July letter, the OPSC submitted that “... *there has been nothing more than an assertion that a position had been adopted*”.

51. The OPSC's submissions dated 6 October 2006 make reference to:

- paragraph 20 of *Ashfield Municipal Council v Roads and Traffic Authority*, which involves a discussion of *Bennett v Chief Executive Officer, Australian Customs Service*, a case to which I have also referred (see above); and
- paragraph 20 of *Temwood Holdings Pty Ltd v WA Planning Commission* [2003] WASCA 112, which:
 - deals with alleged disclosures of privileged legal advice that differ markedly from the second paragraph of the 18 July letter or the third, fourth and fifth paragraphs of the pro forma letter; and

- is not relevant to this review given that neither the PSC / OPSC nor the DG-EQ respectively have made “a mere reference to the existence of legal advice”.

52. Also in its submissions dated 6 October 2006, in relation to the 18 July letter, the OPSC submitted that “... *the person entitled to the privilege is the client in this case, the Public Service Commissioner or more broadly the Office of Public Service Merit and Equity of which the Commissioner is the head. It is the conduct of the client which must give rise to the inconsistency: see Mann v Carnell at [29]*”.
53. In my view, it is arguable that the PSC or OPSC, (rather than the whole of government), is the client entitled to claim privilege over the matter in issue. However, I note that for the purposes of this decision it is not necessary for me to determine this issue.
54. Regardless of whether the privilege-holder is narrowly construed to be the PSC or OPSC, or more broadly interpreted as the whole of government, it is my view that LPP has been waived by conduct inconsistent with the maintenance of LPP over the matter in issue, by either:
- the PSC’s or OPSC’s wide distribution of the pro forma letter; or
 - the DG-EQ in his subsequent 18 July letter to the applicant.

The PSC’s or OPSC’s wide distribution of the pro forma letter

55. It is my view that the third, fourth and fifth paragraphs of the pro forma letter:
- constitute a summary of legal advice, and a statement that the summary is based on legal advice; and
 - are similar to the matter disclosed in the cases set out above, where various courts have found that the disclosure of a summary of legal advice, and a statement that the summary is based on legal advice, is inconsistent with the maintenance of LPP and therefore constitutes waiver of LPP.
56. If the PSC or OPSC is the privilege-holder, I note that relevant conduct of the PSC or OPSC as the privilege-holder includes distribution of the PSC’s pro forma letter containing a summary of the matter in issue, and a statement that the summary was based on legal advice (in the third, fourth and fifth paragraphs):
- to twenty-nine Directors-General (or equivalent) on 29 June 2005; and
 - to twenty-six Human Resources Managers (or equivalent) on 5 July 2005.
57. I also note that the pro forma letter was widely distributed in the manner set out above:
- without any advice to the recipients that its contents was privileged and should remain confidential; and

- in order to set out a statement of new government policy which the recipients had an obligation to disseminate to affected employees in order to implement the policy.

58. On the information available to me, it is my view that the PSC's or OPSC's wide distribution of the pro forma letter without mention that its contents was privileged or confidential and must remain so (which seems unlikely given that it contained a statement of new policy which could not have been implemented without informing relevant employees of its existence):

- was inconsistent with the maintenance of LPP; and
- amounts to a waiver of LPP held by the PSC or OPSC.

The DG-EQ's subsequent 18 July letter to the applicant

59. With respect to the 18 July letter, it is my view that the second paragraph:

- constitutes a summary of legal advice, and a statement that the summary is based on legal advice; and
- is similar to the matter disclosed in the cases set out above, where various courts have found that the disclosure of a summary of legal advice, and a statement that the summary is based on legal advice, is inconsistent with the maintenance of LPP and therefore constitutes waiver of LPP.

60. Further, on the information available to me it is my view that:

- on receipt of the pro forma letter, the DG-EQ received from the OPSME both a summary of the matter in issue, and a statement that the summary was based on legal advice; and
- the DG-EQ then paraphrased the summary of legal advice, and the statement that the summary is based on legal advice, in the second paragraph of the 18 July letter.

61. Accordingly in the alternative, if the whole of government is the privilege-holder (which is not an issue requiring determination in this external review) it is my view that:

- the DG-EQ possessed actual or ostensible authority to waive LPP given his level of authority and responsibility within government; and
- the provision of the 18 July letter to the applicant amounts to a waiver of LPP.

Summary

62. In summary, it is my view that:

- LPP over the matter in issue has been impliedly waived (by either the PSC/OPSC's pro forma letter or the DG-EQ's 18 July letter); and
- the matter in issue is not exempt from disclosure on the basis of s.43(1) of the FOI Act.

Decision

63. I set aside the internal review decision of the PSC dated 24 October 2005. In substitution for it, I decide that the matter in issue does not qualify for exemption from disclosure to the applicant under the FOI Act.
64. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act* 1992.

F. Henry
Assistant Information Commissioner

Date: 7 December 2006